notice and all the ingredients necessary to so quantify the amount payable are provided in the notice without uncertainty or ambiguity such a notice per se is not bad.

I hold that where in the body of the notice, to the ingredients for calculating the interest ordered, the words 'and continuing' or other words of like effect are appended, that could amount to the demand being uncertain and as such bad.

I also hold that where in the body of the notice there are no such words but in the particulars appended to the notice those words appear and have the effect of giving particulars of the judgment or order on the basis of which the notice is given, that does not necessarily make the notice bad for uncertainty. What is relevant is what is demanded and if what is demanded is exact, then such a notice is not necessarily bad for uncertainty.

In the instant petition with the use of the words 'and still continuing' in respect of interest in the body of the notice and the words 'with further interest on $10,526.72 at the rate of 8% pa from 1 July 1988 to the date of final payment or of receiving and adjudication orders' in the particulars have the combined effect of not making what is demanded clear and can even be said to have misled the recipient.

Accordingly I hold that the notice to each of the two judgment debtors is bad and cannot be saved by s 131 and consequently the bankruptcy proceedings emanating from them are a nullity.

(The other 19 matters were also disposed of based on and applying the ratio decidendi herein.)

Petition dismissed.

Solicitors: *Lee & Lee.*

Reported by *PS Ranjan*

Winnie Young v William Lee Say Beng

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 184 OF 1987
HAIDAR J
9 SEPTEMBER 1989

Family Law — Custody of infant — Parents separated — Infant staying with father and paternal grandparents — Application by mother for custody alleging change of circumstances — Presence of mistress and her children — Presence of insane sisters — Whether child would have difficulty adapting to new environment of change of custody ordered

The plaintiff and defendant were married in June 1979 and had a child in May 1980. The marriage did not seem to get off happily from the very beginning and the parties finally separated in the middle of 1981. The child was initially taken by the plaintiff to stay with her mother but was subsequently given to the care and custody of the defendant's parents who went to stay with the defendant in 1986. The defendant was then living with his mistress, a widow, who had two sons by her previous marriage. In July 1988, a baby boy was born to her and the defendant. The plaintiff applied for custody and maintenance of the child on 16 June 1987 alleging the following change of circumstances: (a) the child was not being well looked after as the defendant's father had to spend more time looking after his wife who had had a stroke; (b) the presence in the household of the defendant's two allegedly insane sisters; and (c) the presence in the household of the defendant's mistress and her two children who allegedly fought with the child. At the time of these proceedings, the marriage of the parties had yet to be dissolved.

Held, refusing the plaintiff's application:

(1) The 'immoral surroundings' issue is not necessarily the stringent rule in considering the custody of a child. In the present case, it was not simply a matter of the defendant taking a mistress as he would have married her but for the obstacle to the dissolution of his marriage to the plaintiff. Further, there was no evidence to question her character and she only began to stay with the defendant about a year after he had separated from the plaintiff.

(2) It is not necessarily the case that all stepmothers are incapable of giving the care and attention of the natural mother. In this instance, the child had been with the defendant's mistress for three years before she had her own child. In the court's opinion, she is a mature and responsible woman who could be a 'good mother' to the child. Further, the child himself said that he liked her as she treated him well.

(3) The plaintiff's allegation that the child was not well taken care of was not supported by the affidavits of the child's teacher and headmaster which in fact seemed to show otherwise.

(4) Not much weight should be attached to the presence of the sisters as there was neither medical evidence to support the nature of their mental illness nor evidence of their being of a violent character.

(5) In view of the conflicting expert opinions as to whether the child would have difficulty adapting to a new environment, it was best to test the same against the result of the interview with the child. In this case, the child stated that he did not wish to follow his mother as he was not used to her. This would tend to support that the change in environment would 'predispose the child to an increased risk of psychological as well as social malfunction in adult life'.

(6) The child is well-established with the defendant who is definitely in a better financial position than the plaintiff to look after the child.

(7) Upon examination, the child of nine years was found to be very intelligent for his age and was quite frank and honest. He clearly indicated his preference to stay with the defendant and grandparents.

(8) Although the plaintiff had love and affection towards the child as any natural mother should, the court had reservations about her sincerity in wanting to take custody of the child.

(9) In the circumstances, for the child's future happiness and sense of security, it was best that there should not be any change in custody.

Cases referred to

1 *Mahabir Prasad* v *Mahabir Prasad* [1982] 1 MLJ 189 (folld)
2 *Goh Kim Hwa* v *Khoo Swee Huah* [1986] 2 MLJ 156 (refd)
3 *Manickam* v *Intherahnee* [1985] 1 MLJ 56 (refd)
4 *J & Anor* v *C & Ors* [1970] AC 668 (refd)

Legislation referred to

Guardianship of Infants Ordinance (Sarawak Cap 93) ss 2, 3(2)
Law Reform (Marriage and Divorce) Act 1976 s 88(2)(b)
Rules of the High Court 1980 O 38 r 2

Perpetua Phang (Miss) for the plaintiff.
JB Singh for the defendant.

Haidar J: This is an application under s 3(2) of the Guardianship of Infants Ordinance (Sarawak Cap 93) in respect of the custody of James Lee Kwok Chiang (infant) filed by Winnie Young, the natural mother of the infant. The application was filed on 16 June 1987 (encl 21).

The plaintiff, Winnie Young was married to the defendant, William Lee Say Beng on 30 June 1979 at the District Office, Kuching. Out of the wedlock, a male child by the name of James Lee Kwok Chiang was born on 6 May 1980 ('the child').

At the time of the marriage, the defendant was working as a magistrate with the Judicial Department. He worked with the department until 1981 when he resigned and set up his own private practice in Sri Aman. The plaintiff resigned from her work immediately before the marriage. It would appear that the marriage did not seem to get off happily from the very beginning. The child was born in Kuching whilst the defendant was working in Miri. After a few months, the child and the plaintiff went back to Miri to stay with the defendant until the beginning of 1981 when the plaintiff and the defendant separated and the plaintiff took the child with her to live with her parents in Kuching. According to the plaintiff, she left Miri for Kuching with the child as they could not get along happily. When the defendant was transferred back to Kuching the plaintiff went back with the child to stay with the defendant. By this time the plaintiff had secured a job with International Times and the child was entrusted to the care of a relative. Approximately in the middle of 1981 the plaintiff and the defendant separated again. This time the plaintiff left the matrimonial home for good as she could no longer tolerate the behaviour of the defendant. She took the child with her from the relative and went to stay at her mother's house. The child was subsequently given to the care and custody of the defendant's mother and the defendant's parents finally, sometime in 1986, went to stay with the defendant in Sri Aman together with the child. The defendant's mother suffered a stroke on 24 August 1986 and is presently receiving treatment from Dr Fong Chee Cheong (encl 9).

After about a year of their separation, that is, sometime in October 1982, the defendant stayed together with a woman named Madam Chua Lee Ing ('Madam Chua') in his house in Sri Aman. Madam Chua became a widow when her husband died of cancer in 1973. She had two children by her previous marriage, both sons aged 17 and 15 years old. Both sons are staying in Kuching and are being looked after by their paternal and maternal uncles respectively and attend schools there. In July 1988 she had a baby boy by the defendant.

According to the plaintiff, when she last visited the child in May 1987 she observed that the child was no longer being well looked after as the defendant's mother was ill with a stroke and defendant's father had to spend more time looking after his wife. There were also the defendant's two sisters allegedly to be insane and the presence of Madam Chua in the house with her two children whom the plaintiff alleged had fights with the child. Hence the present application by the plaintiff for custody and maintenance of the child in 1987.

Five affidavits were filed by the plaintiff in support of her application whereas the defendant filed eleven affidavits in opposition of the application. The plaintiff filed a summons in chambers under O 38 r 2 of the Rules of the High Court 1980 on 6 October 1987 to cross-examine the defendant, his father and Madam Chua on their affidavits affirmed on 29 September 1987. On 8 October 1987, the court granted the application of the plaintiff but at the same time ordered that the plaintiff be also cross-examined on her affidavit.

With the consent of both counsel, it was agreed that the hearing of the application of the plaintiff fixed for hearing on 22 May 1989 in Sri Aman be adjourned and heard in Kuching.

Now, according to s 2 of the Guardianship of Infants Ordinance (Sarawak Cap 93), in matters relating to custody of an infant, the court in deciding that question '*shall regard the welfare of the infant as the first and paramount consideration* and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother

be deemed to have any claim superior to that of the father' (emphasis added).

The phrase 'first and paramount consideration' was considered by the Federal Court in *Mahabir Prasad* v *Mahabir Prasad*[1] where Raja Azlan Shah CJ (Malaya) (as His Highness then was) said at p 193:

> ... The phrase 'first and paramount consideration' does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration. We think that 'it connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.' (per Lord MacDermott in *J & Anor* v *C & Ors* [1970] AC 668).

Further on, it is stated:

> ... The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare.

It is observed that from the start of the marriage there was a dispute between the plaintiff and the defendant as to whether the plaintiff should work, especially after the birth of the child. From the evidence it is clear that the child's early days were spent in the care of a servant and both the child and the servant did not live in the same house as the parents. Both the plaintiff and the defendant would visit the child and occasionally the child would be brought to spend the nights in the matrimonial home. Finally the child was taken to the care of the parents of the defendant in Kuching first and then they left to stay in Sri Aman with the defendant.

The plaintiff filed this proceeding because of the change of circumstances, for example the paternal grandmother of the child was down with stroke and could not take care of the child properly, the defendant is staying with another woman in the same house and there was the presence of the alleged two mental sisters of the defendant and the child was not properly taken care of. At the time the proceeding was filed, the plaintiff's marriage to the defendant is not dissolved yet and still is until now. Both of them initially filed a joint petition for the dissolution of their marriage wherein it was agreed that the custody of the child be given to the defendant but the arrangement was that the physical custody of the child was with the defendant's parents. In any event the joint petition did not go through apparently, according to the plaintiff, because the defendant was unwilling to continue with the said joint petition. However according to para 19 of the defendant's affidavit (encl 12), he could not continue with the joint petition for the dissolution of the marriage as he could not afford to complete the purchase of the new house for her.

From the beginning of his life, the child did not have the true care and love of both the plaintiff and the defendant. That, I think, is quite clear. However busy the parents may be, in my view, it is not wise for a child to live separately at such a young age from his parents and further to live with a servant! Be that as it may, I have to examine the relevant factors and then decide on the course to be followed which is most in the interest of the child's welfare.

The 'immoral surroundings' and the 'stepmother' issues can conveniently be dealt with together. It is not disputed that the other woman, Madam Chua, is currently staying together with the defendant and now has a child by him. Though initially the defendant's parents were not happy with such an arrangement, they had come to terms with it as the defendant's parents realized that the marriage of the parties could no longer be saved. In that context we should not consider the 'immoral' issue in a narrow perspective. It is not a matter of the defendant simply taking a woman as mistress but here the defendant would have married the other woman but for the obstacle to the dissolution of the marriage. In fact the plaintiff, in para 7 of her affidavit (encl 30), alleged that she discovered that the defendant and Madam Chua got married in Sri Aman! Madam Chua has not been married since her husband died in 1973 and there is no evidence to question her character and she stayed with the defendant only after a year after the defendant had separated from the plaintiff. The child, in my interview with him in chambers, said in no uncertain terms of his preference to stay with his father and paternal grandparents. No doubt Siti Norma Yaacob J said in *Goh Kim Hwa* v *Khoo Swee Huah*[2] that 'the presence of the respondent's mistress in the matrimonial home can hardly be described as conducive to the welfare and proper upbringing of a 13-year-old boy and two sisters aged 12 and 9. No right thinking parent can deny that the immoral arrangement by the respondent must have a negative effect on the minds of the three young children ...'; yet her Lordship ordered that the boy be given to the custody of the respondent apparently taking into consideration of the wishes of the boy. It follows therefore that the 'immoral' issue is not always necessarily the stringent rule in considering the issue of custody of a child. Taking into account of the surrounding circumstances I do not think the 'immoral' issue, as raised by Miss Phang, is a factor that can be successfully argued against the custody of the child being with the defendant.

As regards 'the stepmother' issue, I have had the benefit of seeing Madam Chua giving evidence in court apart from her affidavit evidence and I am of the opinion that she can be a good 'mother' to the child. The child

himself said that he liked her and she treated him well and did not scold or beat him. In fact she regularly takes him to school. He is aware that the defendant had a child by her and he expressed his liking for the baby and often played with him. According to *Manickam* v *Intherahnee*,[3] Wan Sulaiman FJ said:

> the care and attention of the natural mother can be reasonably expected to be superior to that of a 'stepmother' particularly one who has a child of her own and with every prospect of additions to the family. It would be reasonable to expect that in a tussle for love and affection, the step child would be the loser.

But are we going to take it wholesale that all stepmothers are incapable of giving care and attention of the natural mother? With respect, I am of the view that it does not necessarily be that way as it depends on the facts and the evidence of each case — there is always an exception to the rule. In this case here, the child had been with Madam Chua for about three years even before she had a child of her own with the defendant. Madam Chua's two own grown up children are not staying with her but are in Kuching with their paternal and maternal uncles and she visited them as often as she can. No doubt it is said that Madam Chua herself is involved in business and entrusted her own baby son to a servant to look after. However as she is the owner of her own business concern and therefore her own 'boss', so to say, she can dictate her own working hours as she had the employees to look after her saloon as opposed to a woman who is working as an employee, as in the case of the plaintiff if she were to continue working. What Miss Phang submitted 'it does not mean at all that if a woman chooses to be a career woman she cannot qualify to be a 'mother'' would equally, if not better, be applicable here in respect of Madam Chua for the reasons as said earlier by me. Madam Chua impressed me as a mature and responsible woman. If she had not treated the child well, the child would have said so to me in my questions to him in my chambers.

As regards the matter of the child turning to his grandfather for affection, I think, this is to be expected in view of the fact that the child spends more time with him as he is not working as opposed to his father who works. This is quite natural in a home where the grandparents stay with their children and grandchildren under one roof. What more as evidence shows the child was left in the care of the grandparents from an early age.

The plaintiff alleged that the child was not well taken of in the custody of the defendant and his grandparents. I must say that this allegation has been exaggerated by the plaintiff as the affidavits of the child's teacher and headmaster (see encls 13 and 15) seemed to show otherwise. In para 5 of encl 13, the child's teacher said that he found the child to be 'very healthy, clean, tidy and neat'. The child's headmaster at para 4 of his affidavit (encl 15) affirmed that the child is in excellent health. He produced a copy of the student's health card (see exh 'JSCT-1') in support thereof which remained incontrovertible.

As regards the allegation of the effect of the presence of the mental sisters of the defendant in the house where the child presently is, I should not attach much weight to it as there is no evidence of the mental sisters being of violent character. As such there is no danger to the environment and even the child, in answer to my question, said that his two aunties talked like small children and are very forgetful. If they were violent in character, he would have said so as I indicated to him whether he can differentiate a person with a sound mind and a person with an unsound mind. In any event there is no medical evidence to support the nature of the mental illness of the two sisters. In fact according to para 7 of the affidavit of Dr Abang Bennett, a psychiatrist with the Sarawak Mental Hospital (encl 28), he expressed the opinion that the presence of an insane person in the family will not affect the child so long as the guardian of the child is not insane and is capable of giving the child love and affection.

We next have the conflicting expert opinions, one given by Dr Yap Chin Hong, a qualified psychiatrist attached to the Sarawak Mental Hospital, Kuching on behalf of the plaintiff and the other by one Dr Abang Bennett Abang Taha, a qualified psychiatrist attached to the Sarawak Mental Hospital on behalf of the defendant. Dr Yap Chin Hong formed the opinion that the child should have no difficulty in adapting to the mother (encl 33) whereas Dr Abang Bennett formed the opinion that it would be expected that the child would adapt poorly to the new life with his mother and to the new environment in the long term. Dr Abang Bennett further said that the separation from the attachment figures like his father, his grandfather and other members of the family constitutes an adverse experience. This adverse experience might predispose the child to an increased risk of psychological as well as social malfunction in the adult life. Faced with the difficulties of the conflicting expert opinions, I think, it is best that such opinions be tested against the result of my interview with the child. The child, in answer to my question, said that he does not want to follow his mother and cried when saying that. I think he was honest enough to say that he did not hate his mother but asserted that he is not used to her as she did not take care of him. It would appear therefore that the expert opinion of Dr Abang Bennett would tend to support that the change in environment of the child would 'predispose the child to an increased risk of psychological as well as social malfunction in the adult life'.

The effects of a change of custody will often be worthy of the close and anxious attention by the court and to this end a passage in the judgment of Lord MacDermott in *J & Anor* v *C & Ors*[4] is of assistance and I quote:

> Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the case containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case.

Therefore, considering the result of my interview with the child and the expert opinions, I am of the view that for the child's future happiness and sense of security, it is best that there should not be any change of custody in this case.

It is to be noted that the plaintiff left the matrimonial home on grounds, inter alia, that she could no longer tolerate the behaviour of the defendant and the circumstances of his family, that is, her father-in-law having a very hot temper and her two sisters-in-law who are mentally unsound and she cannot get along with them. What sort of behaviour of the defendant that she could not tolerate was not revealed and according to what can be gathered, the defendant's parents and sisters did not stay permanently with them during their marriage. I am inclined to accept the defendant's evidence that the plaintiff was more interested in maintaining herself as a career woman. The defendant said that she was earning only $300 per month and the amount was just slightly more than the amount he had to pay the relative to look after the child and yet she insisted that her job was more important to her. It would appear that she is more interested in trying to get as much as she can from the defendant as is borne out by the failure to agree on the dissolution of the marriage, as according to the defendant, he could not complete the purchase of the new house for the plaintiff. In fact the child, in answer to my question, said that the plaintiff told him over the phone that if the defendant gives her a lot of money she will take care of him.

According to the plaintiff, she is prepared to resign from her job if custody is given to her and the defendant provides a maintenance of $1,000 per month. She bought a double-storey house with some financial assistance from her sister and I am sure she has to pay her sister back for the financial assistance and it will be worse if she were to leave her job. Would she be in a good position to provide the comforts of the child apart from love and affection compared to the defendant? Further, the fact is that the child is well-established with his father and the environment and the father is definitely in a better financial position than the plaintiff. In fact the child said that the plaintiff is out to cheat the defendant of his money. When I asked him what he knows of the word 'cheating', he replied that the plaintiff told him over the phone that if the defendant gives her a lot of money she will take care of him. It may be asked how reliable the evidence of a child of nine years can be. I will now deal with my assessment of the child.

Section 88(2)(b) of the Law Reform (Marriage & Divorce) Act 1976 requires a court, among other more important considerations, to have regard 'to the wishes of the child, where he or she is of an age to express an independent opinion'. No doubt the Federal Court said in *Manickam*'s case,[3] that they do not think that a child of eight years of age can reasonably be expected to express any independent opinion on his preferences but that was a general observation as the learned judicial commissioner had failed to question the child, which was one of the grounds of complaint. In this case I had the benefits of interviewing the child in my chambers in the presence of my interpreter and he is nine years of age and I formed the opinion that he is very intelligent for his age. My opinion is supported by the affidavit of his teacher, headmaster and the two psychiatrists, who had the opportunity to interview him. In the course of my interview with him he was quite frank and honest. He said that he is a bit happy when his mother visited him. She is kind to him. However he said that he did not love his mother because she left him when he was young and visited him once in a while. By such a statement the child was expressing his inner feelings of the lack of affection and motherly love on the part of the plaintiff. There is that feeling, I should say, of being 'unwanted' by the plaintiff. Further he was frank enough to say that his father and the others did tell him about the case and about his mother wanting to take him but they did not tell him about the details of the case. I am inclined to accept that the child was not coached by his father or his grandfather as otherwise he could very well have said that they did not say anything to him about the case thereby protecting them. I am of the view that the child spoke quite freely and candidly.

There is no doubt that the plaintiff has the love and affection towards the child as any natural mother should but I have my reservations about her sincerity in wanting to take custody of the child for the reasons adverted to earlier by me. Having taken all the other factors into consideration, and as per Lord MacDermott 'the course to be followed will be that which is most in the interests of the children's welfare ...' quoted with approval in *Mahabir Prasad*'s case,[1] I would in the circumstances consider that the interests of the welfare of the child dictate that he be given to the custody of his father and I do so

order. I also order that the plaintiff shall of course have reasonable access to the child.

In view of the order that I made, the issue of maintenance does not arise. In the circumstances of the case, I am of the view that the proper order as to costs should be that each party bears its own costs.

If there is a change of circumstances later, the plaintiff is at liberty to apply.

Application dismissed.

Solicitors: *Reddi & Co Advocates; JB Singh & Co Advocates.*

Reported by *Michele Rasanayagam*